INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:

Atlantic, The, 53 Fed. 607	8
Butler v. *Ellis*, 45 F. 2d 951	8
City of Los Angeles v. *United Dredging Co.*, 14 F. 2d 364	9
Ellis v. *United States*, 206 U. S. 246	7
Gale v. *Union Bag and Paper Corporation*, 116 F. 2d 27, certiorari denied, 313 U. S. 559	5, 6
Great Lake Dredge and Dock Co. v. *Walling*, No. 412, this Term	2, 3, 5, 6, 7, 10
Hurricane, The, 2 F. 2d 70	8
International Stevedoring Co. v. *Haverty*, 272 U. S. 50	8
Kibadeaux v. *Standard Dredging Co.*, 81 F. 2d 670, certiorari denied, 299 U. S. 549	8
Manhattan Lighterage Corp. v. *Anderson*, No. 121, this Term	5, 6
Maryland Casualty Co. v. *Lawson*, 94 F. 2d 190	8
McRae v. *Bowers Dredging Co.*, 86 Fed. 344	8
Norton v. *Warner Co.*, 321 U. S. 565	6, 8
Phillips Co. v. *Walling*, 324 U. S. 490	8
Saylor v. *Taylor*, 77 Fed. 476	8
Scott, In re, 250 Fed. 647	10
Warner v. *Goltra*, 293 U. S. 155	6

Statute:

Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. sec. 201), Sec. 13 (a) (3)	2, 5

668605—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 413

BAY STATE DREDGING AND CONTRACTING COMPANY, A CORPORATION, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 18–19) is not officially reported. The opinion of the Circuit Court of Appeals (R. 23–32) is reported at 149 F. 2d 346.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 9, 1945 (R. 33). A petition for rehearing was denied on July 20, 1945 (R. 33).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's dredgeworker employees are seamen within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act and so exempt from the overtime provisions of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 13 (a) (3) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201) provides that

> The provisions of sections 6 and 7 shall not apply with respect to * * *
> (3) any employee employed as a seaman * * *.

STATEMENT

Like *Great Lakes Dredge & Dock Co.* v. *Walling,* No. 412, this Term, pending on petition for certiorari, this case arose as an action by the Administrator of the Wage and Hour Division to enjoin petitioner from violating the overtime provision of the Fair Labor Standards Act in relation to its employees engaged in marine construction and dredging operations. The employees particularly involved are dredgeworkers.[1]

[1] No question is raised concerning the precise scope of this category. The opinion of the Circuit Court of Appeals

The facts as summarized by petitioner (Pet. 4–8) emphasize the duties of dredgeworkers while the dredges are being towed to the site of operations. The court below concluded, however, that "the work these dredgemen were employed to do was not connected with voyages on the sea, except occasionally and incidentally, as they were taken from one job to another. Their work was essentially connected with excavation and not with navigation." (R. 26.)

The facts are contained in an agreed statement of facts (R. 8–16) and do not vary in essentials from those in *Great Lakes Dredge & Dock Co.* v. *Walling*. The types of equipment operated by the petitioners in the two cases are substantially the same and the duties of the employees involved are virtually identical. The Court is therefore respectfully referred to the statement in the Administrator's brief in opposition in No. 412 for an account of the significant facts. The agreed statement of facts in the present case does not

states (R. 26) that "scow or bargemen are admitted to be seamen", and the petition in No. 412 asserts that this limitation creates a conflict between this case and that one. As is explained in the brief in opposition in No. 412 (pp. 11–14), the record in the present case does not contain such an admission, and we construe the court's statement to refer to those employees, if any, who work wholly or mainly on barges and whose duties concern the transportation of their content. If problems arise on this score under the decision in either this case or No. 412, they can be resolved administratively and do not present a ground for the issuance of writs of certiorari.

show, however, as does the stipulation in No. 412, that the employees are paid by the hour, but merely that they have been employed more than the normal workweek prescribed in the Fair Labor Standards Act without the payment of overtime compensation (R. 16). So far as appears, moreover, all of petitioner's dredges contain living quarters (R. 11), whereas some of those of the Great Lakes Company do not; but when a job is being carried on close to Boston, petitioner's headquarters, many of the employees go ashore to their own living quarters in or near the city. It also appears that the meals which petitioner serves to its dredgemen and for which they pay have always represented a financial loss to the company (R. 11).

The agreed statement of facts in the present case also shows that one of the employees on each of petitioner's dredges is known as the mate and that he is in charge of the so-called running lights, as well as of the deckhands (R. 14). It also appears that the operator, or assistant captain, maneuvers the dredge in position and operates the whistles by which other craft are signalled (R. 12, 14). The employees designated as scowmen performed their duties in part on a dredge and in part on scows. The principal difference between the work of the deckhands on a dredge and the scowmen is that the scowmen accompany the scow on its voyage to the dumping ground. (R. 15.)

ARGUMENT

This case, which, as has been stated (*supra*, p. 2), involves substantially the same facts as *Great Lakes Dredge & Dock Co.* v. *Walling*, pending on petition for a writ of certiorari, No. 412, this Term, also presents the same question of the scope of the exemption of seamen in Section 13 (a) (3) of the Fair Labor Standards Act, *supra*, p. 2. This question is similar to that in *Manhattan Lighterage Corporation* v. *Anderson*, certiorari denied, October 8, 1945, No. 121, this Term, involving lighter captains in New York Harbor, in which the Administrator has filed a memorandum as *amicus curiae*. The Court is therefore respectfully referred to that memorandum and to the brief in opposition in No. 412 for a full statement of the Government's contentions. The present brief deals with certain contentions of the petitioner which are not made, or which appear in a somewhat different light, in the other cases.

Petitioner contends (Pet. 28) that the decision below is in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *Gale* v. *Union Bag & Paper Corporation*, 116 F. 2d 27, certiorari denied, 313 U. S. 559. A similar contention is made by the petitioner in *Manhattan Lighterage Corporation* v. *Anderson* and is dealt with in the Administrator's memorandum in that case at pages 14–15. As is stated there, the decision

in the *Union Bag & Paper Corporation* case is based largely upon the fact that the principal duties of the employees involved were performed during the actual course of transportation of the material carried in the barges upon which they worked, rather than in loading or unloading them. The dredgeworkers involved in the instant case and in the *Great Lakes Dredge & Dock Company* case, on the other hand, like the lighter captains in the *Manhattan Lighterage* case, do not engage primarily in operating water-borne craft as means of transportation. Petitioner's dredgeworkers and those of the Great Lakes Company engage, rather, in labor of various sorts having to do with construction and dredging—operations carried on at fixed sites. Their duties in moving the dredges are largely incidental. *Gale* v. *Union Bag & Paper Corporation* was decided upon entirely different facts, and, we submit, presents no conflict.

Petitioner also relies upon cases which have arisen under other statutes and which have included dredgeworkers within the category of seamen or have included dredges within the general category of marine craft. This Court has pointed out, however, that the meaning of the term "seaman" for the "purpose of a particular statute * * * must be read in the light of the mischief to be corrected and the end to be attained." *Warner* v. *Goltra,* 293 U. S. 155, 158. See also *Norton* v. *Warner Co.,* 321 U. S. 565, 570–572. The meaning of the term, or of similar

terms, in other statutes may therefore not be extended to the Fair Labor Standards Act without reference to the appropriateness of such a meaning to the purposes of that Act. This is stressed in the opinion of the court below (R. 26–27, 30–32). The Circuit Court of Appeals for the Seventh Circuit in the *Great Lakes Dredge & Dock Co.* case likewise grounded its decision upon the same view (No. 412, R. 128). Under this view, which we submit is correct, the citation of decisions under other statutes is of minimum assistance in determining the meaning of the seamen's exemption in the Fair Labor Standards Act.

Among the decisions cited by petitioner (Pet. 21, 31–34) is *Ellis* v. *United States,* 206 U. S. 246. The significance of that case is discussed in our brief in opposition in No. 412, at pages 9–11. Like other cases under different statutes, the *Ellis* case throws little light upon the question in hand. The legislation which Congress subsequently enacted to overcome the effect of the *Ellis* decision is, moreover, at least equally significant and shows that Congress regarded dredgeworkers as in the category of "laborers and mechanics", ordinarily employed on land, in legislation fixing maximum hours of employment on government projects. The same view leads to the conclusion that the dredgemen in petitioner's employ are not within the seaman's exemption under the Fair Labor Standards Act.

Petitioner also relies upon cases which hold that dredgeworkers are entitled to a maritime lien for their wages (Pet. 11, 18). *The Atlantic,* 53 Fed. 607 (D. S. C.); *McRae* v. *Bowers Dredging Co.,* 86 Fed. 344 (C. C. W. D. Wash.); *The Hurricane,* 2 F. 2d 70 (E. D. Pa.); *Saylor* v. *Taylor,* 77 Fed. 476 (C. C. A. 4); *Butler* v. *Ellis,* 45 F. 2d 951 (C. C. A. 4). These decisions result from the same principle of liberal interpretation of remedial statutes which is applicable to the Fair Labor Standards Act. *Phillips Co.* v. *Walling,* 324 U. S. 490. The fact that this principle leads to overlapping concepts under different statutes does not invalidate the concept which is correctly applied under either one in order to accomplish the purposes of the legislation, as the court below expressly recognized (R. 31–32).

Petitioner further relies upon cases arising under the Jones Act, which gives to "any seaman" injured in the course of his employment a cause of action similar to that given to railway employees by the Federal Employers' Liability Act (Pet. 11, 25, 27). Many classes of maritime workers connected with vessels, including stevedores, have been brought within its protection. *Kibadeaux* v. *Standard Dredging Co.,* 81 F. 2d 670 (C. C. A. 5), certiorari denied, 299 U. S. 549; *Maryland Casualty Co.* v. *Lawson,* 94 F. 2d 190 (C. C. A. 5); *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50. See *Norton* v. *Warner Co., supra,* at

p. 570. Here again the remedial purposes of the statute have led to a broad interpretation of the term "seaman" which does not conflict with a narrow interpretation of the same term in relation to an exemption from the Fair Labor Standards Act.

Petitioner also points to *City of Los Angeles* v. *United Dredging Co.*, 14 F. 2d 364 (C. C. A. 9), in which it was decided that a city ordinance requiring the inspection of steam boilers and appliances and requiring the operators thereof to be licensed, does not apply to sea-going barges and their engineers, on the ground that both are under the exclusive maritime jurisdiction of the Federal Government. It is of course true that the maritime jurisdiction of the Federal Government, in the sense of authority to legislate, extends to all persons and vessels upon the navigable waters. Insofar as this fact is relevant in the interpretation of statutes and ordinances, it may properly be taken into account; but it does not aid in determining whether a particular act of Congress applies to a particular group of workers whose employment is subject to Federal regulation. It is worthy of note, moreover, that petitioner's dredges are inspected only by the Division of Public Safety of Massachusetts and that the only licenses required of any of its dredge employees are those which the State issues to persons who operate steam boilers or hoisting engines (R. 16).

Clearly the proper course in respect to the seaman's exemption from the Fair Labor Standards Act, as in the interpretation of other statutes, "is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature" (*In re Scott*, 250 Fed. 647, 648 (S. D. Ala.)). This the court below and the Circuit Court of Appeals for the Seventh Circuit in the *Great Lakes Dredge & Dock Company* case have done. We submit that their conclusion is correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

WILLIAM S. TYSON,
Acting Solicitor

BESSIE MARGOLIN,
Assistant Solicitor

DAVID O. WALTER,
Attorney
United States Department of Labor

OCTOBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945